RECENT DECISIONS.

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ADMIRALTY—JURISDICTION—THIRD PARTIES.—A steamship company and a warehouseman, against whom the steamship company had a common-law cause of action only, were joined as respondents. The warehouseman was not originally liable in admiralty to the libellant. *Held,* the warehouseman could have been petitioned in and, therefore, could be sued as an original respondent. *Evans* v. *New York etc. S. S. Co.* (1908) 163 Fed. 405. See Notes, p. 648.

BANKRUPTCY—JURISDICTION—REPLEVIN.—A trustee petitioned a District Court to re-take property held by a sheriff under a state court's writ of replevin. *Held,* the court had no jurisdiction. *Matter of Rudnick & Co.* (1908) 20 Am. Bank. Rep. 33.

Under § 23b of the Act of 1898 the bankruptcy court cannot, without the consent of the defendant, determine an adverse claim. *Bardes* v. *Hawarden Bank* (1900) 178 U. S. 524, which is defined as the assertion of some title, interest, or right to the property of the bankrupt. See 1 COLUMBIA LAW REVIEW 189; 8 COLUMBIA LAW REVIEW 219. Earlier parallel decisions, however, have indicated a view contrary to the present case, construing § 67f, which avoids all levies, judgments, attachments or other liens secured within four months of the petition, as including replevin. *In re Haynes* (1903) 123 Fed. 1001; *In re Hymes Buggy Co.* (1904) 130 Fed. 977; *Matter of Weinger* (1903) 126 Fed. 875; cf. *In re Robinson and Smith* (1907) 154 Fed. 343. But these cases appear unsound since § 23b has been held to limit § 67f. *In re Tune* (1902) 115 Fed. 906; *Mueller* v. *Nugent* (1899) 91 Fed. 621. Thus while an attachment based on the assertion of property in the bankrupt, may be dissolved under § 67f; *In re Valentine* (1899) 2 Am. Bank. Rep. 522; if there be an execution sale under a levy, the proceeds cannot be reached as they are held adversely. *In re Knickerbocker* (1903) 121 Fed. 1004. So also, a writ of replevin is grounded on the assertion of property in the plaintiff, adverse to the bankrupt, and similarly jurisdiction should be refused. However, the situation in the principal case, substituting as it were, diligence for equality, is against the general policy of the Act and seems to call for further legislation. See *Mitchell* v. *McClure* (1899) 91 Fed. 621, 623.

CONSTITUTIONAL LAW—DUE PROCESS—STATUTES OF REPOSE.—An Act of Congress provided that money deposited in court, unclaimed for ten years or longer, should be paid over to the credit of the United States. A motion was made that certain unclaimed money, deposited in court in 1893 to be paid *pro rata* to the bondholders of a corporation, be thus paid to the United States. *Held,* the Act was unconstitutional. *American Loan & Trust Co.* v. *Grand Rivers Co.* (1908) 159 Fed. 775. See Notes, p. 658.

CORPORATIONS—SIGNATURE—RATIFICATION AND ADOPTION.—An alleged contract, between two corporations, providing for services not to be performed within one year, bore the typewritten signature of the defendant corporation, without the additional signature of an authorized agent. *Held,* there was not a proper signing of the corporate name and no subsequent recognition of such signature could be an adoption. *The Richmond Steel Spike etc. Co.* v. *The Chesterfield Coal Co.* (1908) 160 Fed. 832.

A mark appearing in any part of the memorandum is a signature within the meaning of the Statute of Frauds if a party's name is thereby intended to be signified. *Snyder* v. *Norris* (1814) 2 M. & S. 286; *Durrell* v. *Evans* (1862) 1 H. & C. 174. No manual act is required; a printed name is sufficient. *Tourrep* v. *Cripps* (1879) 48 L. J. Ch. n. s. 567. A signing by a third person is binding if the party sought to be charged consented to the writing of his name. *Clason* v. *Bailey* (1817) 14 Johns. 484. Corporations may sign as individuals, Angel & Ames, Priv. Corp. 219, and if the

agent sign, the fact of procuration need not appear. *Nat'l Bank* v. *Martin* (1891) 82 Ia. 442. Since in the principal case the corporation consented to the writing down of its name the decision is erroneous. The case is also illustrative of a too frequent indiscriminate use of the terms "ratification" and "adoption." Ratification, the subsequent authorization of an unauthorized act or contract made in behalf of the principal, *McArthur* v. *Times Printing Co.* (1892) 48 Minn. 319, relates back to the time of the act from which time the contract dates. The principle must have been in existence at that earlier time. *Stansby* v. *The Boat Co.* (1869) 2 Daly 898. When, however, an act is performed for a then non-existent principal who later assumes it, or for the actor, and is assumed subsequently by a third party as his own it is then adopted. There is no relation back and a new contract is entered into between the adopter and his contractee upon the terms of the previous one. *Battelle* v. *Northwestern Cement & Concrete Pavement Co.* (1887) 37 Minn. 89.

DEEDS—INSERTION OF GRANTEE'S NAME AFTER DELIVERY.—A grantor delivered a deed with parol authority to the grantee to insert his own name therein. *Held,* grantee took title under the deed. *Einstein* v. *Holladay-Klotz Co.* (Mo. 1908) 111 S. W. 859.

The weight of modern authority in this country is that an agent acting under parol authority may insert the grantee's name in a deed and make delivery. *Cribben* v. *Deal* (1891) 21 Ore. 211. But except where the grantor is bound by estoppel, *Phelps* v. *Sullivan* (1885) 140 Mass. 36, or by ratification, *Devin* v. *Himes* (1870) 29 Ia. 297, (neither element present in the principal case) the decisions have gone no further than to allow the grantee's name to be so inserted before the delivery of the conveyance to him. See *Allen* v. *Withrow* (1884) 110 U. S. 119, 129. *Contra, Treadgill* v. *Butler* (1884) 60 Tex. 599. Title does not pass until the delivery, Shep. Touch. 57; *Xenos* v. *Wickham* (1863) 14 C. B. N. S. 435, 473, of a completed deed. *Duncan* v. *Hodges* (S. C. 1827) 4 McCord 239. Delivery is a matter of intention, *Weber* v. *Christen* (1887) 121 Ill. 91, and is complete when the parties intend that title shall pass. *Ruckman* v. *Ruckman* (1880) 32 N. J. Eq. 259, 261. Manifestly, where the parties intend delivery to be complete only upon the filling in of the blanks, the deed (except possibly on grounds of public policy, see *Burns* v. *Lynde* (Mass. 1863) 6 Allen 305, 311) may be sustained. See *Van Etta* v. *Evenson* (1871) 20 Wis. 33. But in the principal case the intention clearly was that the grantee should be invested with title when he received the deed. Such delivery as there was took place at that time. But as no title could pass under the incomplete deed then delivered, and as there was never any redelivery of the completed deed, it is not apparent how the grantee's title is to be sustained.

EASEMENTS—ANCIENT LIGHTS—IMPLIED GRANTS.—An owner of adjoining lots conveyed to the plaintiff one with a house thereon, the windows of which overlooked the other lot. He now seeks to enjoin an obstruction of his windows by an erection on the lot retained. *Held,* there was an implied grant of the easement of light and air. *Fowler* v. *Wick* (N. J. 1908) 70 Atl. 682.

The general rule is that easements reasonably necessary to the enjoyment of a part of property granted will be implied, but easements in favor of the portion retained will not be, with the one exception of ways of necessity, *Pinnington* v. *Galland* (1853) 9 Ex. 1; *Wheeldon* v. *Burrows* (1878) L. R. 12 Ch. Div. 31, though some jurisdictions do not recognize the distinction, *Greer* v. *Van Meter* (1896) 54 N. J. Eq. 270. An easement, to be implied, must be open, visible and continuous, as well as necessary. *Whiting* v. *Gaylord* (1895) 66 Conn. 337. There is a conflict of authorities as to whether a negative easement as light and air, has the necessary elements. In England the doctrine of lights is both well settled and well known. There is no considerable mobility of titles. Naturally, then, a grantee is presumed to have an unrestricted right to lights unless that was not the intention of the parties. *Myers* v. *Catterson* (1889) L. R. 43 Ch. Div. 470. An implied reservation of such an easement, however, is not allowed. *Ellis* v. *Carriage*

Co. (1876) L. R. 2 C. P. D. 13. But the general mobility of titles in the United States and the dislike of rights of so indefinite a character have led to the rejection of this doctrine in most jurisdictions, not only as in conflict with the policy of registration laws, *Robinson* v. *Platt* (1895) 65 Conn. 365, but also as productive of litigation and embarrassing to the improvement of the estates. *Keats* v. *Hugo* (1874) 115 Mass. 205. In several jurisdictions it may be implied where actually necessary to enjoyment, but not even then, if the grantee can provide other lights at a reasonable cost. *Turner* v. *Thompson* (1877) 58 Ga. 268; *Rennyson's Appeal* (1880) 94 Pa. St. 147. The principal case approximates this latter rule.

EVIDENCE—PERSONAL COMMUNICATIONS UNDER SEC. 829, N. Y. CODE CIV. PROC.—In an action brought on a promissory note against the executor of the deceased maker, the plaintiff, in order to lay a foundation for identifying the decedent's handwriting, attempted to show that she had seen him write on various occasions. *Held,* the evidence was inadmissible under Sec. 829, N. Y. Code Civ. Proc. *Wilber* v. *Gillespie* (1908) 39 N. Y. Law Jour. No. 124. See Notes, 650.

EVIDENCE—TESTIMONY AT FORMER TRIAL—INTRODUCTION OF CROSS-EXAMINATION.—At a trial for murder, the state introduced the direct and cross-examination of one of its witnesses at a former trial, who had since died. The defendant objected to the admission of the cross-examination. *Held,* the evidence was admissible. *Pratt* v. *State* (Tex. 1908) 109 S. W. 138.

Under the Hearsay Rule, barring exceptions, no evidence, the truth of which has not been guaranteed by cross-examination, is receivable. Wig. Evid. § 1362; *Minn. Mill Co.* v. *Minn. R. R. Co.* (1892) 51 Minn. 304. Testimony at a former trial and depositions may be regarded as analogous, see Wig. Evid. §§ 1370, 1401 *et seq.,* and satisfy the Hearsay Rule. *Chase* v. *Springville Mills Co.* (1883) 75 Me. 156; *U. S.* v. *Macomb* (1851) 5 McL. 286. Depositions, once filed, are in the custody of the court, the property of neither party, *Nash* v. *State* (Ia. 1849) 2 Greene 286, and the direct and cross-examination may be used, irrespective of who conducted them. *Hale Bro.* v. *Gibbs* (1876) 43 Ia. 380. Similarly, it is submitted, the testimony of a witness at a former trial becomes evidence in the case, *Evans* v. *Reed* (1875) 78 Pa. St. 415, and, subject to proper objection, may be introduced by either party. See *Hudson* v. *Roos* (1889) 76 Mich. 173. It is not a mere substitute for personal examination in court, allowing counsel the privilege of determining the questions and answers to be introduced. Thus, if competent when originally given, it is admissible although the witness has subsequently become disqualified through interest. *Pratt* v. *Patterson* (1876) 81 Pa. St. 114; *Bowie* v. *Hume* (1898) 13 D. C. App. 286. The principal case may accordingly be sustained.

EVIDENCE—TESTIMONY OF SUBSEQUENT REPAIRS.—The plaintiff was injured by a defective machine. Witness A testified to subsequent repairs. Witness B was later shown a photograph of the repaired machine, and testified as to the character of the repairs. The defendant objected to the testimony of both. *Held,* by divided court, all the testimony was admissible. *Plunkett* v. *Clearwater Bleachery etc. Co.* (1908) 61 S. E. 431.

Evidence of repairs made after an accident is not admissible as an admission of negligence, because the inference is an unjust one to draw and public policy forbids it. *Morse* v. *Minn. etc. R. R.* (1883) 30 Minn. 465. Some courts have allowed its introduction, not as an admission of negligence, but as an admission that the place was defective, *St. L. & S. F. R. R.* v. *Weaver* (1886) 35 Kan. 412, but, in general, the same reasons operate to exclude in this case as operate in the former. *Corcoran* v. *Village of Peekskill* (1888) 108 N. Y. 157. The nature of subsequent repairs may, however, be shown to rebut testimony of the defendant in regard to the condition of the place after the accident, *City of Taylorville* v. *Stafford* (1902) 196 Ill. 188; *Choctaw etc. R. R.* v. *McDade* (1903) 191 U. S. 64, and it is submitted that, wherever evidence of the condition of the place after the accident has been introduced by either party, and it becomes necessary, in determining the condition of the place at the time of the accident, to show

the nature of the changes subsequently made, such evidence should be admitted under proper safeguards. See *L. & N. R. R.* v. *Malone* (1895) 109 Ala. 509. It is not introduced as an admission, and hence no rule of public policy excludes. In the principal case, the testimony of A was relevant only as an admission and, therefore, should have been excluded, while the testimony of B, under the foregoing principles, was correctly admitted.

GUARDIAN AND WARD—CONFLICT OF LAWS—FOREIGN GUARDIAN.—One under guardianship "by reason of physical disability" in New Hampshire, was adjudged a bankrupt in Vermont where he had resided for a year with his guardian's consent. *Held*, the foreign guardian could not vacate the adjudication. *In re Kingsley* (1908) 160 Fed. 275.

The jurisdiction to appoint guardians of infants was inherent in Chancery, Woerner, Guardianship § 16, while that of lunatics was derived from the King as *parens patriæ*. *In the Matter of Colah, a lunatic.* (N. Y. 1871) 3 Daly 529. All guardians, however, were under the supervision of the Chancellor. 1 Bl. Comm. 463. Guardianship of spendthrifts, etc., is a statutory extension of that over lunatics. Cf. Woerner, *supra*, § 114. Courts in laying down rules have failed to realize these several origins. Cf. *Morgan* v. *Potter* (1895) 157 U. S. 195. The relation between an infant and his guardian is governed, similarly to administration of a decedent's personal estate, by the law of the infant's domicile, *Lamar* v. *Micou* (1885) 114 U. S. 218; Story, Conflict of Laws (8th Ed.) 694, but that between guardians and other incompetents should be governed by the law of jurisdiction appointing the guardian. *In the Matter of Colah, supra; Ibid.* 6 Daly, 308. Further, it is said that a ward upon leaving the jurisdiction that appointed his guardian at once becomes *sui juris*. *Gates* v. *Bingham* (1881) 49 Conn. 275. This is obviously impossible if the ward is an infant, due to the nature of the disability; but if the ward is a spendthrift, it is true simply because the guardian's authority is derived from a statute and purely local. Hence the statement in the principal case that the guardian consented to the ward's residing in Vermont was irrelevant. The conclusion of the principal case, however, is correct, though the result was reached on the somewhat superficial reasoning common to this subject, due probably to the existence of statutes affecting guardianship.

HIGHWAYS—OBSTRUCTIONS—RECOVERY BY NON-ABUTTER.—A hotel keeper sued a railroad company for damages caused by obstructing streets not adjacent to her property but furnishing the most convenient access thereto. *Held*, that the plaintiff could recover under a constitutional provision requiring compensation for property taken or damaged. *Illinois Central Ry. Co.* v. *Elliott* (Ky. 1908) 110 S. W. 817.

An abutter may recover for an obstruction which directly interferes with his right of access. *Putnam* v. *Boston & Providence R. R.* (1903) 182 Mass. 351. A non-abutter, like the general public, has a mere right of user, and to recover must show an injury differing in kind from that of the general public. *Gilbert* v. *S. L. & P. Ry. Co.* (1889) 13 Col. 501, and an action cannot be grounded upon mere difference in degree. *Buhl* v. *Fort Street Union Depot Co.* (1884) 98 Mich. 596. Courts differ widely in applying these generally accepted rules. The same sort of injury is held, on the one hand, to differ in kind, *Foust* v. *Penna. R. R. Co.* (1905) 212 Pa. St. 213, and on the other to differ merely in degree. *Dantzer* v. *Ind. Union Ry. Co.* (1895) 141 Ind. 604. Under provisions requiring compensation for property taken or "damaged" some courts still apply the common-law rule of special damage, while others hold that the word "damaged" extends the remedy to cases of actual injury though suffered in common with the rest of the public. *Rigney* v. *City of Chicago* (1882) 102 Ill. 64. The latter is the English view. *Caledonian Ry. Co.* v. *Walker's Trustees* (1881) L. R. 7 App. Cas. 259. Though difficult to apply, it has been accepted, as in the principal case, by many American jurisdictions and seems preferable.

INSURANCE—INSURABLE INTEREST—TRANSFER.—The defendant promised to support the plaintiff, his father, in consideration of the plaintiff's allowing

him to take out in his stead, insurance on the life of the plaintiff's wife. *Held,* that the contract was without consideration as no insurable interest was transferred by the agreement. *Schwerdt* v. *Schwerdt* (Ind. 1908) 85 N. E. 613.

To prevent gambling through insurance companies, *Ruse* v. *Mutual Ins. Co.* (1851) 23 N. Y. 516; May, Ins. (3rd Ed.) 75, every policy holder is required to have in the life insured an interest resting on pecuniary benefit, *Lewis* v. *Phœnix Ins. Co.* (1872) 39 Conn. 100, or, by the modern view in some jurisdictions, on close relationship. *Warnock* v. *Davis* (1881) 104 U. S. 775 at 779; Joyce, Ins. 888; but see *Guardian M. L. Ins. Co.* v. *Hogan* (1875) 80 Ill. 35. The assignment of a policy to one who has no insurable interest is by some courts held void as an evasion of the above rule. *Roller* v. *Bean* (1889) 86 Va. 512; *Franklin Ins. Co.* v. *Hazzard* (1872) 41 Ind. 416. In other jurisdictions such assignment unless obviously made for gambling purposes, is held valid on the ground that choses in action should be uniformly assignable. *Steinback* v. *Diepenbrock* (1899) 158 N. Y. 104; *Mutual Life Ins. Co.* v. *Allen* (1884) 138 Mass. 34. The principal case would be supported in either class of jurisdiction, for the arguments in favor of the assignability of a chose in action do not apply to the attempted transfer of the mere right to obtain a chose in action, while the arguments against the evasion of the rule as to wagering policies apply directly to the principal case. See *Burbage* v. *Windley* (1891) 108 N. C. 367.

INSURANCE—RECOVERY OF PREMIUMS—FRAUD—ESTOPPEL.—A wife insured her husband's life without his consent. Subsequently learning that such consent was necessary, she concealed the want of it from the insurance company. Later she sued to recover the premiums paid. *Held,* her subsequent concealment estopped her from denying the want of consideration. *Marling* v. *Metropolitan Ins. Co.* (1908) Ohio, Hamilton Co. C. P.

Provisions of an insurance policy are construed like provisions in other contracts. *Ins. Co.* v. *Pyle* (1886) 44 Oh. St. 19. An unperformed condition, precedent to liability, prevents the insurer from assuming the risk, *Metropolitan Ins. Co.* v. *Felix* (1905) 73 Oh. St. 46, accordingly the premiums paid should in good conscience be returned, *Tyrie* v. *Fletcher* (1777) Cowp. 666, unless the insured has been guilty of fraud. *Hoyt* v. *Gilman* (1811) 8 Mass. 336; *Friesmuth* v. *Agawan Mut. Ins. Co.* (Mass. 1852) 10 Cush. 587. But mere misrepresentation is not sufficient to bar recovery. *Feise* v. *Parkinson* (1812) 4 Taunt. 639; *Ins. Co.* v. *Pyle, supra.* Recovery is then denied because the law will not raise an obligation of an equitable nature to relieve one who has parted with money in an attempt to defraud. Cf. *Taylor* v. *Grand Lodge, A. O. U. M.* (1905) 96 Minn. 441. An estoppel requires misrepresentation and an actual change of position. Ewart Estoppel, 140, but see *Lewis* v. *Phœnix Mut. Ins. Co.* (1872) 39 Conn. 100. Clearly the doctrine of estoppel is misapplied in the principal case. The court finds neither fraud nor misrepresentation on the part of the plaintiff in securing the contract, nor was there any change of position as a result of her subsequent concealment. In the principal case, the court should have affixed the date of the beginning of the plaintiff's actual concealment and allowed recovery, at least, for premiums paid before that date.

INTERSTATE COMMERCE—LICENSE FEES—GROSS RECEIPTS.—A state law imposed a tax on railroads "equal to" one per cent. of their gross receipts, graduated according to mileage. *Held,* as to receipts from interstate business, the statute was invalid. *Railway Co.* v. *Texas* (1907) 210 U. S. 217.

A state tax on persons, *Crandall* v. *Nevada* (1867) 6 Wall. 35, or goods, *State Freight Tax* (1872) 15 Wall. 232, transported from state to state, is invalid as a regulation of commerce. On principle, a tax on the receipts of such carriage is equally objectionable, and, though sustained in earlier cases, see *State Tax on Gross Receipts* (1872) 15 Wall. 284, is now uniformly held void. *Steamship Co.* v. *Pa.* (1887) 122 U. S. 326; *Telegraph Co.* v. *Seay* (1889) 132 U. S. 472. A state, however, may require a license fee from a corporation engaged in interstate business, if exacted only for

the privilege of doing intrastate business. *Pullman Co.* v. *Adams* (1903) 189 U. S. 420. The amount of this fee, it has been held, may be measured by the gross receipts apportioned to mileage. *Maine* v. *Ry. Co.* (1891) 142 U. S. 217. But a distinction between a license fee "equal to," and one "upon" such receipts is unsound, see 7 COLUMBIA LAW REVIEW 530; Cooke, Com. Clause, Sec. 73a, and inconsistent with *Steamship Co.* v. *Pa., supra.* See Prentice, Com. Clause, 272. Although the principal case attempts to justify *Maine* v. *Ry. Co., supra,* on its facts, yet its disapproval of the above mentioned distinction is emphatic, and that case is in effect overruled. The decision in the principal case is fortunate in marking a return to the rule of *Steamship Co.* v. *Pa., supra.*

LANDLORD AND TENANT—BREACH OF AGREEMENT TO REPAIR—A TORT.—The plaintiff leased premises from defendant who knowing a floor to be defective agreed to repair. *Held,* personal injuries are recoverable in a tort action based on the defendant's negligence. *Graff* v. *Lemp Brewing Co.* (Mo. 1908) 109 S. W. 1044.

Damages resulting from failure to perform certain contracts are recoverable in tort because they arise from a violation of the legal duties incident to the relationship (common carrier, innkeeper, etc.) established by the contract. Burdick, Law of Torts, 5-16. The relationship of landlord and tenant, however, does not impose upon the landlord any duty to repair, McAdam, L. & T. 1238, except in regard to those portions of the building which are under his control. *Dollard* v. *Roberts* (1891) 130 N. Y. 269. With this exception, therefore, a breach of an agreement to repair is not a violation of a tenant's legal right so as to support an action in tort, *Tuttle* v. *Gilbert M'f'g Co.* (1887) 145 Mass. 169, and personal injuries resulting from failure to repair are not recoverable, *Davis* v. *Smith* (1904) 26 R. I. 129, in the absence of some active negligence or misfeasance distinct from the mere breach of promise. *Tuttle* v. *Gilbert M'f'g Co., supra.* Thus in the principal case no tort action should be allowed. But see *Moore* v. *Steljes* (1895) 69 Fed. 518. The reasoning of *Thompson* v. *Clemens* (1903) 96 Md. 196 apparently *contra* fails to establish the breach of any duty other than that arising from contract. Assuming the existence of a duty and its violation by the landlord, the same test of negligence should be applied to the tenant to determine his contributory negligence. *Sanders* v. *Smith* (N. Y. 1893) 5 Misc. 1. In the principal case both parties having equal knowledge of the conditions, the decision in favor of the tenant appears unsound.

MUNICIPAL CORPORATIONS—LICENSEE—INDEPENDENT CONTRACTOR'S TORTS.—Plaintiff's child was killed by a gas pipe negligently secured on an inclined street by independent contractors for the defendant, which operated under the city. *Held,* defendant was liable. *O'Hara* v. *Laclede Gas Light Co.* (Mo. App. 1908) 110 S. W. 642.

Immunity from liability for an independent contractor's torts does not apply when the superior is under a special duty. *Smith* v. *Milwaukee Exchange* (1895) 91 Wis. 361. The duty of municipalities to keep streets in reasonably safe condition, though unknown to the English common law, *Morey* v. *Town of Newfane* (1850) 8 Barb. 645, is in this country, where not regulated by statute, generally implied from privileges of control over streets granted by charters or by state laws for the corporate benefit. Dillon, Municipal Corporations, (3rd Ed.) § 1014; Elliott, Streets and Roads (2nd Ed.) § 611; *Carsen* v. *City of Genesee* (1903) 9 Ida. 244; *Grove* v. *City of Ft. Wayne* (1874) 45 Ind. 429. The city is therefore liable for negligence of its contractors in the use of streets, *Storrs* v. *City of Utica* (1858) 17 N. Y. 104, either by *respondeat superior* or because the contract gives constructive notice of the unsafe condition, and the duty of care is not delegable to the contractor. *Village of Jefferson* v. *Chapman* (1889) 127 Ill. 438; *City of Savannah* v. *Waldner* (1873) 49 Ga. 316. The reasoning of the principal case is open to two constructions. If it rests on the theory of a duty delegated to the defendant it cannot be sustained since a duty not delegable to a contractor, is certainly not delegable to a mere licensee; if

on the theory that a licensee's privilege in the use of streets imposes a special liability analogous to the city's liability, it is supported by some authority, *Street Ry. Co.* v. *Dudgeon* (1900) 184 Ill. 477; *Benjamin* v. *Street Ry. Co.* (1895) 133 Mo. 274, 284, but see, *contra, Railroad* v. *McConnel* (1891) 87 Ga. 756; *Blake* v. *Ferris* (1851) 5 N. Y. 48, although the majority of cases generally cited to support this view rest mainly on considerations of nuisance, *Wiggins* v. *St. Louis* (1896) 135 Mo. 558, danger inherent in the work, *Loth* v. *Theatre Co.* (1906) 197 Mo. 328, or express stipulation for its careful conduct. *McWilliams* v. *Detroit Central Mills Co.* (1875) 31 Mich. 274.

NEGLIGENCE—MEASURE OF DAMAGES.—A Pullman porter stole from a state-room a bag containing medicines. As a result, the plaintiff, a woman in delicate health, at the end of her journey was in a state of physical collapse. *Held,* damages were recoverable not only for the pecuniary value of the medicines, but also for the physical and mental suffering of the plaintiff. *Bacon* v. *Pullman Co.* (1908) 159 Fed. 1. See Notes, p. 656.

NEGLIGENCE—RISK IN SAVING LIFE OR PROPERTY.—A driver, whose team was stalled upon a railroad track as a result of the company's negligence, ran up the track to stop an approaching train and was killed. *Held,* that his act was not negligence *per se. Thompson* v. *Seaboard Air Line Ry. Co.* (S. C. 1908) 62 S. E. 396.

Due to the law's regard for human life, negligence will not be imputed to an effort to preserve it, *Eckert* v. *L. I. Ry.* (1871) 43 N. Y. 502, unless the attempt be unnecessarily rash; *Penn. Co.* v. *Langendorf* (1891) 48 Oh. St. 316; since the impulse to rescue is instinctive, the injury received is a proximate result of the negligence or misfeasance occasioning the original danger. *Gibney* v. *State* (1893) 137 N. Y. 1. It has been held that these principles do not extend to efforts made to save endangered property. *Eckert* v. *L. I. Ry., supra; Cook* v. *Johnson* (1885) 58 Mich. 437; *Morris* v. *L. S. & M. S. Ry.* (1896) 148 N. Y. 182. But generally it is not negligence *per se* to endanger one's self to save property, *Henry* v. *The Cleveland C. C. & St. L. Ry. Co.* (1895) 67 Fed. 426, the effort being regarded as natural and probable, *Wasmer* v. *D., L. & W. R. R. Co.* (1880) 80 N. Y. 212, and injuries thus received are proximate results, *Berg* v. *The Great Northern Ry.* (1897) 70 Minn. 272, even though the property endangered be that of another; *Liming* v. *Ill. Cent. Ry. Co.* (1890) 81 Ia. 246; *contra, Pike* v. *The Grand Trunk Ry.* (1889) 39 Fed. 255; though recovery is not permitted where no prudent man would incur the obvious danger. *Pegram* v. *The R. R.* (1905) 139 N. C. 303. Thus risking injury to save human life or property is not negligence *per se,* but in both cases such action is presumptively negligent. *Pegram* v. *The R. R., supra; Linnehan* v. *Sampson* (1879) 126 Mass. 506. In general this presumption in case of effort to save property is very much stronger than where life is to be rescued and one is not justified in exposing himself to as great a risk in saving property as saving human life.

NEGOTIABLE PAPER—EXTENSION—EFFECT ON NEGOTIABILITY.—A promissory note contained the clause, "the makers and indorsers * * * consent that time of payment may be extended without notice." *Held,* negotiable. *First Nat'l Bank of Pomeroy* v. *Buttery* (N. D. 1908) 116 N. W. 321.

Although the weight of authority is opposed to the principal case, Daniel Neg. Inst. (4th Ed.) 1, page 50; 7 Cyc. 600; *Woodbury* v. *Roberts* (1882) 59 Ia. 348; *Smith* v. *Von Blarcom* (1881) 45 Mich. 371; *Coffin* v. *Spenser* (1889) 39 Fed. 263, it finds increasing favor in several jurisdictions, *Farmer et al.* v. *Bank* (1906) 130 Ia. 169; *Bank* v. *Goodloe Co.* (1902) 93 Mo. App. 123; *Bank* v. *Kenney* (Tex. 1904) 83 S. W. 368, and seems to be the better view. The clause does not extend time of payment but merely guards against the necessity of securing the sureties' consent if the holder should contract with the maker to extend. See Norton Neg. Inst. (3rd Ed.) 306, 307. Contrary decisions hold that such clauses render the time of payment not only unascertainable by indorsees from the face of the note, but also

uncertain ultimately to arrive. Although by the strict principles adopted by the Law Merchant to promote the circulation of commercial paper, the date of payment must be fixed, it is now well settled that if the fact of payment be certain, though the time be uncertain, the note is negotiable. *Walker* v. *Roberts* (1842) Car. Mar. 590; *Bank* v. *Skeen* (1890) 101 Mo. 683. The possibility that an essential term will be ascertainable only from a collateral agreement does not of itself destroy the note's negotiability. *Wilson* v. *Campbell* (1896) 110 Mich. 580; *Chicago Ry.* v. *Merchants' Bank* (1889) 163 U. S. 268; and see *McClellan* v. *Norfolk Ry. Co.* (1888) 110 N. Y. 479. The contention that the note might never fall due seems negligible, since an agreement to extend for an indefinite time amounts to a release, and an agreement to extend left indefinite as to time is construed as for a reasonable time, *Capron* v. *Capron* (1872) 44 Vt. 410, and the possibility that repeated extensions of time might postpone the date of payment indefinitely is even more remote than in the case of negotiable sight notes. See *Protection Ins. Co.* v. *Bill* (1863) 31 Conn. 534.

PARTNERSHIP—TEST OF PARTNER—PARTICIPATION IN PROFITS.—The plaintiff attempted to hold as a partner, A, who was to receive a share in the profits and interest for money advanced. A could inspect the books and his consent was necessary for certain loans. It was also stipulated that A was not a partner. *Held,* A was not a partner. *Russell* v. *Norton et al.* (1908) 39 N. Y. LAW JOUR. 2217.

The early rule in England, based upon the seeming injustice to creditors, that as regards third parties, persons sharing in profits should be viewed as partners though they were not such *inter se, Waugh* v. *Carver* (1797) 2 H. Bl. 235 was first shaken in *Cox* v. *Hickman* (1860) 8 H. L. Cas. 268, and has been departed from in later decisions. *Bullen* v. *Sharp* (1865) L. R. 1 C. P. 86. The old doctrine, however, distinguished cases where profits were given as compensation for services, *Williamson* v. *Frazier* (1803) 4 Esp. N. P. Cas. 182, or where a sum equal to a share was given. *Ex parte Hamper* (1811) 17 Ves. Jr. Rep. The present English theory conforms with the fundamental doctrine that a partnership is created by contract and not imposed by law; Burdick, Partn. 5, that the intention of the parties to carry on a joint business should govern and that the participation in profits is only presumptive evidence. *Badeley* v. *Con. Bank* (1888) L. R. 38 Ch. Div. 238. This doctrine has received general approval in this country. *Meehan* v. *Valentine* (1845) 145 U. S. 611; *Smith* v. *Knight* (1873) 71 Ill. 148; *Beecher* v. *Bush* (1881) 45 Mich. 188. In New York, however, in *Leggett* v. *Hyde* (1874) 58 N. Y. 272, the modern English principle was riscarded but later cases qualified the rule then adopted, *Richardson* v. *Hughitt* (1879) 76 N. Y. 55; *Cassidy* v. *Hall* (1884) 97 N. Y. 159, which was, however, reiterated in *Hackett* v. *Stanley* (1889) 115 N. Y. 625, and there seems a reversion to the strict following of the old view. *Lefevre* v. *Silo* (1906) 112 App. Div. 474. Though the principal case may be supported on appeal, and still reconciled with previous decisions, it would be desirable if the court clearly accepted the logical view of the English courts.

PLEADING AND PRACTICE—EQUITABLE DEFENSE TO LEGAL CAUSE OF ACTION—JURY TRIAL.—In a legal action on a check, defendant intervened seeking a cancellation thereof. *Held,* the answer converted the case into one in equity which should have been tried without a jury. *Thompson* v. *Nat'l Bank* (Mo. 1908) 110 S. W. 618.

To a statutory legal action of foreclosure, legal and equitable defenses were interposed. *Held,* court may submit legal issues to a jury and try the equitable issues to the court. *Maas* v. *Dunmyer* (Okla. 1908) 110 S. W. 591.

In general the character of the action is determined by the complaint. *O'Bierne* v. *Bullis* (1899) 158 N. Y. 466. Accordingly, an equitable defense to a legal cause of action will not deprive plaintiff of his right to a jury trial. *Wolff* v. *Schaeffer* (1879) 4 Mo. App. 367. Nor will a legal defense to an equitable cause of action, make a jury trial a matter of right. *Mackellar* v. *Rogers* (1888) 109 N. Y. 468. But where the defendant sets up an independent equitable cause of action amounting to a cross-bill in equity

which, if established, destroys plaintiff's case, the action becomes one in equity and a jury trial is not a matter of right. *Buckner* v. *Mear* (1875) 26 Oh. St. 514; *Marling* v. *B. C. R. & N. Ry. Co.* (1885) 67 Ia. 331. This distinction is sound since here the plaintiff is not in fact deprived of his right to jury trial, for the defendant "concedes the plaintiff's right to recover unless the equity defense prevails." *Ridgeway* v. *Herbert* (1899) 150 Mo. 606, 612. The first principal case may be supported on this theory. Where, as in the second case, both legal and equitable issues are raised on the pleadings, they should be separated. *Fish* v. *Benson* (1886) 71 Cal. 428. While the defendant has a right to a jury trial of the legal issues, *Smith & Co.* v. *Bryce* (1881) 17 S. C. 538, 544, he cannot demand jury trial of the equitable issues as well. *Smith* v. *Moberly et al.* (Ky. 1854) 15 B. Mon. 70; *Weber* v. *Marshall* (1861) 19 Cal. 447. But New York is *contra. Davis* v. *Morris* (1867) 36 N. Y. 569. Accordingly both cases under consideration are sound.

POWERS—PERPETUITY—PROPERTY IN A POWER.—A testator created a trust in a share of real property in favor of his daughter F, and provided that upon the death of the survivor of his two daughters the share should go to F's appointees by deed or will, or in default of such appointment to her heirs. F by will created a trust in the same property for the life of an intended beneficiary. *Held,* F did not have an estate in fee and her appointment was void as a perpetuity, but (dictum) had a fee as to creditors. *Farmers' Loan & Trust Co.* v. *Kip.* (N. Y. 1908) 85 N. E. 59. See Notes, p. 652.

QUASI-CONTRACTS—MONEY PAID UNDER MISTAKE OF FACT—NEGOTIABLE PAPER.—The plaintiff accepted and paid a check, the signature of the maker of which was forged. The payee, the City of New York, applied it, at the forger's direction, for his own purposes and without the defendant's knowledge, to discharge a lien against land which the defendant had already contracted to sell unencumbered, and which he shortly afterwards so conveyed. *Held,* recovery denied. *Title Guarantee & Trust Co.* v. *Haven* (1908) 111 N. Y. Supp. 309. See Notes, p. 654.

REAL PROPERTY—CONTINGENT REMAINDER—EXECUTORY DEVISE.—A testator gave a life estate to A with a limitation over to the first son who "shall attain, or have attained 21 years." *Held,* that the words created a contingent remainder and not an executory devise. *White* v. *Summers* (Ch. Div. 1908) 98 L. T. 845. See Notes, p. 646.

SALES—EXPRESS STATEMENT OF IMPLIED WARRANTY.—Executory contract to supply carbureters "to be constructed in a workman-like manner." *Held,* the express warranty added nothing to the one that the law would imply. Plaintiff after acceptance cannot recover for defects in construction. *Heath Dry Gas Co.* v. *Hurd et al.* (N. Y. 1908) 40 N. Y. L. J., Nov. 4th.

The principal case rests on the authority of *Reed* v. *Randall* (1864) 29 N. Y. 358, and *Gaylord Mfg. Co.* v. *Allen* (1873) 53 N. Y. 515. *Reed* v. *Randall* held, a provision that the tobacco contracted for should be "well cured" was not an express collateral warranty. The words used were merely descriptive; a statement of the implied condition of merchantability, action upon which would not survive acceptance. *Reed* v. *Randall, supra,* 362. Later cases have refused to apply the rule where the defects are latent, *Parks* v. *Morris, etc., Co.* (1874) 54 N. Y. 586; *Carleton* v. *Lombard, etc., Co.* (1896) 149 N. Y. 137, or where the words can be construed as constituting a collateral warranty. *Zabriskie* v. *C. V. R. R. Co.* (1892) 131 N. Y. 72; *Bull* v. *Bath Iron Works* (1902) 75 App. Div. 380. If the court in the principal case regards the words of the contract merely as expressive of the implied condition of merchantability and not of an express collateral warranty, the result reached, except possibly on the ground that the defect was latent, (see opinion below, 128 App. Div. 68,) is sound under the New York rule. See *contra, Poulton* v. *Lattimore* (1829) 9 B. & C. 259; *Morse* v. *Moore* (1891) 83 Me. 472. But if in assuming, as the court does, that "the words of agreement were equivalent to those of warranty", it means equiva-

lent to collateral warranty, which even in New York survives acceptance, *Day* v. *Poole* (1873) 52 N. Y. 416, the reasoning of the case is opened to criticism. If the seller intended to enter into an express contract of warranty and thereby to preserve to the buyer the very right (i. e. the right to recover for defects after acceptance) which but for such express agreement he would lose by accepting the goods, there is no apparent reason why effect should not be given to this express contract.

SPECIFIC PERFORMANCE—CONTINUOUS ACTS.—Plaintiff sued to enforce defendant's contract to furnish the city's telephone service for twenty years. *Held*, that a decree should be granted. *Telephone Co.* v. *City of Hickman* (Ky. App. 1908) 111 S. W. 311.

The force of the rule that equity will not decree specific performance of contracts requiring continuous acts, because of its inability to enforce such decree, is weakened by the absence of a test determining what degree of duration or complexity renders acts unenforcible by equity. Story, Equity (13th Ed.) §725. The supposed doctrine that equity will not enforce contracts to build or repair, *Beck* v. *Allison* (1874) 56 N. Y. 366, is burdened with exceptions, Fry, Spec. Perf. (3rd Am. Ed.) 81, and its validity frequently denied. *Mayor* v. *Emmons* (1901) L. R. 1 K. B. D. 515; *Jones* v. *Parker* (1895) 163 Mass. 564. The practice of evading precedents by enjoining the breach instead of decreeing the performance of the contract, *Lane* v. *Newdigate* (1806) 10 Ves. 192; *Western Union Co.* v. *R. R.* (1880) 3 Fed. 423, also evidences the flexibility of the rule. The cases rest ultimately on a balancing of the contract's importance and the inconvenience of supervising enforcement. *Schmidtz* v. *L. & N. Ry. Co.* (1897) 101 Ky. 441, 479. On this principle equity generally denies specific performance of acts extending over many years. *Powell Duffryn Coal Co.* v. *Taff Vale Ry. Co.* (1874) L. R. 9 Ch. App. 331; *Marble Co.* v. *Ripley* (1870) 10 Wall. 339; but see, *Wolverhampton Co.* v. *London Co.* (1873) 16 Eq. 433, *contra*, but when, as in the principal case, public interests demand specific performance, American courts of equity will often decree it and if necessary supervise it for an indefinite period. *Joy* v. *St. Louis* (1890) 138 U. S. 1. Followed in *Franklin Telegraph Co.* v. *Harrison* (1891) 145 U. S. 459; *The Prospect Park, etc., Ry. Co.* v. *The Coney Island, etc., Ry. Co.* (1894) 144 N. Y. 152. And, aside from the possible political inexpediency of prolonged judicial interferences with private enterprise, these decisions seem sound.

TORTS—UNBORN INFANTS—RIGHT TO SUE.—A pregnant woman injured through the defendant's negligence subsequently gave birth to a deformed child. *Semble*, the child could not recover. *Prescott* v. *Robinson* (N. H. 1908) 69 Atl. 522.

At common law an assault upon a pregnant woman resulting in still birth was not murder, 3 Co. Inst. 50; but see Staunford P. C. 12. If, however, a child quick at the time of the assault died after birth it was regarded as a homicide. 1 Hawkins P. C. 31, s. 16, but see 1 Hale P. C. 433. Birth therefore must have been necessary either as evidence to prove that a living person had been injured or to constitute the *fœtus* a legal person. If birth serves only an evidentiary purpose the *fœtus* must be regarded as a legal person, and the right to sue admitted, but the burden would be upon the infant after birth to establish the causal connection between the act, or omission, and the injury. Bevan Negligence, pp. 84-86. Compare *The George and Richard* (1871) L. R. 3 Adm. 466, where the tort to the unborn child was established, and recovery allowed. Nor is this view vitiated by the unavailability thereunder of contributory negligence as a defense inasmuch as an infant is never bound to exercise a degree of care incommensurate with his mental and physical capabilities, *Roberts* v. *Terre Haute Elec. Co.* (1905) 37 Ind. App. 664; *Mowrey* v. *Central City Ry.* (N. Y. 1867) 66 Barb. 43, aff. (1873) 51 N. Y. 666. But by the decided cases birth is essential to legal existence, and recovery is denied the unborn child as one to whom there was no duty owing. Wherefore the *dictum* in the principal case is sound. *Allaire* v. *St. Luke's Hosp.* (1901) 184 Ill. 359; *Gorman*

v. *Budlong* (1901) 23 R. I. 169; *Dietrich* v. *Northampton* (1884) 138 Mass. 14; *Walker* v. *Great Northern Ry.* (1891) 28 L. R. Ir. 69.

TRUSTS—CHARITABLE TRUSTS—PARTIAL INVALIDITY.—A testator gave $6,000 to his executors in trust to apply the income: first, to keep in good condition her family burial lot; second, to keep in good condition the rest of the churchyard; third, with the balance, to make up the pastor's salary if needed. *Held,* the first two gifts were void as a perpetuity, the third was a valid charity, but the whole was void for uncertainty. *Van Syckel* v. *Johnson* (N. J. 1908) 70 Atl. 657.

A gift in trust for keeping up a family burial lot, not being a charity, is void as a perpetuity. *Rikard* v. *Robson* (1862) 31 Beav. 244. If a single fund is provided for several purposes, some of which are legal, and some illegal, the cases fall into two groups. (1) Where the fund is given partly for a purpose which fails and partly for a valid charitable purpose. If the amount required to satisfy the illegal purpose is reasonably ascertainable, two funds are in effect created and the gift to the charity is good; *Hoare* v. *Osborne* (1886) L. R. 1 Eq. 585; if that amount is not ascertainable the gift to the charity fails for uncertainty. *Limbrey* v. *Gurr* (1819) 6 Madd. 151. (2) Where the residue remaining after satisfying an invalid purpose is given to a charity. The English decisions treat this case as a gift to the charity subject to an invalid gift which fails, and the whole goes to the charity. *Dawson* v. *Small* (1868) L. R. 18 Eq. 114. This is very questionable as a fixed rule, but is well settled. *In re Birkett* (1878) 9 Ch. Div. 576. Further it is held that a gift to keep in repair a churchyard is good as a charity, and that a gift to keep in repair a family vault is ascertainable in amount. *In re Vaughan* (1886) L. R. 33 Ch. 187. Therefore in the English courts the gift for the family lot would have fallen into the residue for the pastor's salary, as would any surplus after keeping the churchyard in repair. In New Jersey the first gift could only have been good if made to a cemetery association, *Moore's Exrs.* v. *Moore* (1892) 50 N. J. Eq. 554, but it would have been more just to sustain the second gift on the reasoning of the English cases. Assuming, as the court did, that both gifts were void, the English construction would have made the entire fund available for the pastor's salary, a result less in accord with the testator's intention than that reached in the principal case.

TRUSTS—SIMPLE TRUST—RIGHT OF CESTUI TO TERMINATE.—A testator bequeathed his estate to trustees to pay one-third of the income to his widow and that of one-fourth of the remainder to a son. Further the son was to be paid one-fifth of his share of the principal upon arriving at 21, three-fifths in the discretion of the trustees at 28, while the remaining one-fifth was to be held in trust. The son assigned the latter four-fifths and the assignee seeks a transfer. *Held,* since the son was not entitled, the assignee could not terminate the trust. *Ballantine* v. *Ballantine* (C. C. A. 1908) 160 Fed. 927, aff. 152 Fed. 775.

The trustee exists for the benefit of the *cestui* and must convey the *res* when and to whom the *cestui,* entitled thereto, directs. [*Watts* v. *Turner* (Eng. 1830) 1 R. & M. 634; *Whall* v. *Converse* (1888) 146 Mass. 345.] The *cestui* may terminate the trust not only when its objects have been fulfilled: [*Dodson* v. *Ball* (1869) 60 Pa. 492]: but also when he is the sole beneficiary, [*Re Brown's Will* (1859) 27 Beav. 324; cf. *Harbin* v. *Masterman* (1894) 2 Ch. 184], or when all the beneficiaries consent, [*Eake* v. *Ingram* (1904) 142 Cal. 15]—though the trustee has active duties, [*Culbertson's Appeal* (1874) 76 Pa. 145], provided that the *cestui* or *cestuis* are *sui juris* [*Saunders* v. *Vautier* (1841) 4 Beav. 115], that no discretion is reposed in the trustee, [*Cooper* v. *Cooper* (1882) 36 N. J. Eq. 121], and that the *cestui's* interest is absolute. [*Nichols* v. *Eaton* (1875) 91 U. S. 716; cf. *Franz* v. *Race* (1903) 205 Pa. 150.] The requirement in Massachusetts that any expression of intention by the testator limiting the beneficiary's interest is valid, *Claflin* v. *Claflin* (1889) 149 Mass. 19; *Young* v. *Snow* (1897) 167 Mass. 287, is contrary to the earlier decisions, *Sears* v. *Choate* (1888) 146 Mass. 395, and is an unwarranted extension of the reason-

ing adopted to support "spendthrift" trusts. Cf. *Ghormley* v. *Smith* (1891) 139 Pa. 584; *Nichols* v. *Eaton, supra.* Clearly then, since the payment of the three-fifths was discretionary in the trustees, the son was not absolutely entitled. While the gift of the remaining one-fifth might have been regarded as a trust separate from the other bequests, cf. *Vanderpoel* v. *Loew* (1889) 112 N. Y. 167, thus entitling the son to the *res* as the sole beneficiary, the contrary construction of the testator's intent, adopted by the court, seems preferable, especially since under the former view the will was maintainable. Cf. *Vanderpoel* v. *Loew, supra,* 177. Accordingly the principal case is correct.

TRUSTS—"SPENDTHRIFT" TRUSTS.—A testator bequeathed property to trustees to pay the income to the *cestui's* personal use free from the claims of creditors. The *cestui* sought to have the trust terminated. *Held,* the petition was dismissed since the will created a "spendthrift" trust. *Van Leer* v. *Van Leer* (Pa. 1908) 70 Atl. 716.

The *cestui* should be entitled to terminate the trust unless his interest is limited by the "spendthrift" clause. The authorities agree that his interest is limited if it is to terminate upon the happening of a condition subsequent, *Nichols* v. *Eaton* (1875) 91 U. S. 716, or if the trustee is "to apply" rather than "to pay" the income. *In re Bullock* (1891) 60 L. J. Ch. 341. But where the settlor creates an estate in the *cestui* and then attaches the limitation that it shall be free from the claims of creditors, one line of cases holds the limitation repugnant to the gift and void. *Brandon* v. *Robinson* (1811) 18 Ves. 429; see Gray, Restraints on Alienation (2nd Ed) §258, while another line maintains that the settlor's intention qualifies the *cestui's* interest. *Broadway Nat'l Bank* v. *Adams* (1882) 133 Mass. 170; *Frantz* v. *Race* (1903) 205 Pa. 150. And see *Ghormley* v. *Smith* (1891) 139 Pa. 584. This latter view does not necessarily involve a negation of the maxim that equity follows the law. Cf. Pomeroy, Equity Jurisdiction §425. Equity has in at least one instance nullified a rule of property—in allowing the equity of redemption. Furthermore, the policy of the law is now broadening. Thus statutes provide for guardians of spendthrifts, Woerner, Guardianship § 114; cf. 1 Bl. Comm. 463, for exemptions of certain property, N. Y. Code of Civ. Proc. 1390 *et seq.,* and for "spendthrift" trusts to the extent necessary for the *cestui's* support. *Tolles* v. *Wood* (1885) 99 N. Y. 616. The rights of creditors cannot be used in argument against this view since the very act of giving credit implies the assumption of risk by the creditor. Furthermore in many cases the creditor is chargeable, under modern recording acts, with constructive notice. See *Nichols* v. *Eaton, supra,* at 725. It would seem, however, despite the persuasiveness of these arguments, that the fostering of a class—usually wealthy—who are legally protected in not paying their debts is contrary to a sound public policy.

WATER AND WATER COURSES—APPROPRIATIONS—INTERSTATE STREAMS.—An appropriator on an innavigable stream in Idaho sued an appropriator in Wyoming to have determined the question of priority. *Held,* the plaintiff was the senior appropriator, and defendant's diversions were enjoined. *Taylor* v. *Hulett* (Idaho 1908) 97 Pac. Rep. 37.

A riparian owner at common law had a right inherent in his riparian land to use the natural flow of the stream for reasonable uses, *Union Mill & Mining Co.* v. *Ferris* (1872) 2 Sawy. 176 at 194; and irrigation if conducted without damage to lower owners was such a use, *Farrell* v. *Richards* (1879) 30 N. J. Eq. 511; *Watkins Land Co.* v. *Clements* (1905) 98 Tex. 578, unless extended to non-riparian lands. *Gould* v. *Eaton* (1897) 117 Cal. 539. In many arid western states the common law rule does not apply. *Willey* v. *Decker* (1903) 11 Wyo. 496. There the first appropriator, on grounds of public policy, acquires a right not inherent in, but appurtenant to his lands, *Lower Kings etc. Co.* v. *Kings River etc. Co.* (1882) 60 Cal. 408; *Rickey etc. Co.* v. *Miller & Lux* (1907) 152 Fed. 11, whether riparian or non-riparian. *Hammond* v. *Rose* (1888) 11 Colo. 524. Further, the extent of subsequent use is determined by the original claim, *Lobdell* v. *Simpson* (1866) 2 Nev. 274; *Butte C. & D. Co.* v. *Vaughn* (1858) 11 Cal. 143, the priority of which

establishes the right even as against subsequent appropriators in other states. *Morris* v. *Bean* (1903) 123 Fed. 618. The rule of priority extends to interstate disputants because the acquisitions are under the statutes of the Federal government, which originally owned the entire region. *Howell* v. *Johnson* (1898) 89 Fed. 556. And a diversion infringing an appropriation is actionable either in the jurisdiction where the act was committed or where the injury was effectuated. *Manville Co.* v. *Worcester* (1884) 138 Mass. 89; *Bulwer's Case* (1583) 7 Coke 1. Accordingly the principal case is sound.